

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ERIC EDWARD JUELL,  
Plaintiff,

NO. CIV S-05-0378 FCD/GGH

v.

MEMORANDUM AND ORDER

FOREST PHARMACEUTICALS, INC.  
and DAVID WILLIAMS,  
Defendants.

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This matter is before the court on defendants' motion to amend the pretrial order pursuant to Rule 16 of the Federal Rules of Civil Procedure<sup>1</sup> to reopen plaintiff's deposition and to compel plaintiff to provide an authorization for his driving record. Plaintiff opposes defendants' motion to reopen his deposition, but has withdrawn his objection regarding his driving

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<sup>1</sup> All further references to a "Rule" are to the Federal Rules of Civil Procedure, unless otherwise noted.

1 record. For the reasons set forth below,<sup>2</sup> defendants' motion is  
2 GRANTED.

3 **BACKGROUND**

4 On January 26, 2005, plaintiff filed a complaint in Nevada  
5 County Superior Court against defendants, alleging state claims  
6 of discrimination on the basis of age, harassment on the basis of  
7 age, wrongful termination in violation of public policy and  
8 failure to prevent harassment in violation of California  
9 Government Code § 12940(k). Defendants removed the case from  
10 state court in February 2005 on the basis of diversity  
11 jurisdiction.

12 On May 2, 2005, the court issued a pretrial scheduling  
13 order, setting the deadline for designation of experts for  
14 January 6, 2006 and the discovery deadline for March 3, 2006.  
15 Subsequently, on March 24, 2006, the court extended the discovery  
16 deadlines to allow defendants to depose plaintiff's belatedly  
17 disclosed expert and to designate a rebuttal expert. (Mem. &  
18 Order [Docket #34], filed Mar. 24, 2006). Thereafter, in June  
19 2006, the court again modified the scheduling order to allow  
20 defendants to bring a motion to compel an examination of  
21 plaintiff pursuant to Rule 35. (Order [Docket # 50], filed June  
22 20, 2006). On September 12, 2006, the court issued its  
23 Memorandum and Order, denying defendants' motion for summary  
24 judgment. (Mem. & Order [Docket #104], filed Sept. 12, 2006).  
25 The court held a pretrial conference with the parties on October  
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27 <sup>2</sup> Because oral argument will not be of material  
28 assistance, the court orders the matter submitted on the briefs.  
E.D. Cal. L.R. 78-230(h).

1 27, 2006 and issued a pretrial order on November 20, 2006.  
2 (Pretrial Order [Docket #110], filed Nov. 20, 2006). The case is  
3 currently set for trial on October 23, 2007.

4 On August 8, 2007, defendants filed a motion to amend the  
5 pretrial order to reopen plaintiff's deposition and to compel  
6 plaintiff to provide an authorization for his driving record.  
7 Defendants base their motion on the following facts, which they  
8 assert were only recently discovered: (1) plaintiff is now able  
9 to work and has begun a new business venture; (2) plaintiff pled  
10 nolo contendere to a misdemeanor vehicle code violation shortly  
11 before he left his employment in 2003; (3) plaintiff was treated  
12 by one of the medical experts in this case as a result of the  
13 plea; and (4) plaintiff pled nolo contendere to DUI charges in  
14 March 2007. Defendants contend that these facts relate to  
15 plaintiff's claims for emotional distress and damages and that  
16 further discovery is necessary before trial.

17 **ANALYSIS**

18 Following a pretrial conference, the pretrial order "shall  
19 be modified only to prevent manifest injustice." Fed. R. Civ. P.  
20 16(e). The party seeking the modification bears the burden of  
21 demonstrating that an amendment is necessary. Galdamez v.  
22 Potter, 415 F.3d 1015, 1020 (9th Cir. 2005). The Ninth Circuit  
23 has enumerated four factors for the district court to consider in  
24 deciding whether to modify a pretrial order: (1) the degree of  
25 prejudice or surprise if the order is modified; (2) the ability  
26 of the non-moving party to cure any prejudice; (3) the impact of  
27 the modification on the orderly and efficient conduct of the  
28 case; and (4) any degree of willfulness or bad faith on the part

1 of the party seeking the modification. Id.; Byrd v. Guess, 137  
2 F.3d 1126, 1132 (9th Cir. 1989) (abrogated on other grounds).

3 Defendants have demonstrated that the limited requested  
4 discovery is necessary to prevent manifest injustice.  
5 Specifically, defendants seek to conduct further discovery in  
6 relation to plaintiff's claim for emotional distress damages.  
7 Defendants seek only to reopen plaintiff's deposition and to  
8 obtain his driving record. It can be assumed that plaintiff is  
9 and has been aware of both his own knowledge and his driving  
10 record; as such, there is no surprise. Moreover, the only  
11 prejudice claimed by plaintiff is that preparation for a  
12 deposition will distract from trial preparation. The pretrial  
13 order in this case was filed months before defendants' filing of  
14 this motion. As such, plaintiff had an expansive amount of time  
15 to prepare for trial. Conversely, defendants have not had an  
16 opportunity to question plaintiff about facts that may be  
17 relevant to his claims, such as his new career that began after  
18 the close of discovery and issuance of the pretrial order.

19 Defendants contend that the trial date will not need to be  
20 postponed for this limited discovery, and thus, the modification  
21 will not disrupt the orderly and efficient resolution of this  
22 matter.<sup>3</sup> However, even if defendants' requested discovery will  
23 require further extension of the trial date, such modification  
24 remains necessary. Without further investigation into these  
25 facts, neither party will be able to file coherent *motions in*

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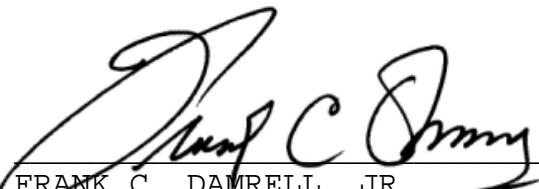
26  
27 <sup>3</sup> Plaintiff contends that if defendants are allowed  
28 discovery, he should be allowed additional discovery as well.  
However, the court does not address this issue as there is no  
such pending motion filed before it.

1 *limine* with regard to these matters.<sup>4</sup> Moreover, the court is not  
2 inclined to allow a jury trial to become a fishing expedition for  
3 further information on these incidents, or alternatively, to  
4 address these issues outside of the presence of the jury during  
5 trial without the benefit of any formal discovery. Finally,  
6 there is no evidence of willfulness or bad faith by defendants.

7 Accordingly, the pretrial order is modified to allow  
8 defendants to reopen plaintiff's deposition for discovery on the  
9 following issues: (1) plaintiff's ability to work and new  
10 business venture; (2) plaintiff's misdemeanor vehicle code  
11 violation in 2003; (3) plaintiff's treatment by one of the  
12 medical experts as a result of the plea; and (4) plaintiff's DUI  
13 charges in 2007.

14 IT IS SO ORDERED.

15 DATED: September 6, 2007

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19 FRANK C. DAMRELL, JR.  
20 UNITED STATES DISTRICT JUDGE  
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25 <sup>4</sup> It appears that such motions are to be expected. In his  
26 opposition, plaintiff objects to the admissibility of his  
27 misdemeanor vehicle violations on the grounds that it is improper  
28 character evidence. The court notes, without ruling, that there  
*could* be alternative grounds for the admissibility of this  
evidence. However, such objections are appropriately brought as  
*motions in limine*.